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No. 96-877

In The

Supreme Court of the United States

October Term, 1996

PAUL H. STITT,

Petitioner,

vs.

CNG TRANSMISSION CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court correctly found under the testimony presented that Respondent has a fifty-foot easement across the lands of Petitioner.

II. Whether the District Court erred in its consideration and treatment of the transcript from the hearing before the Board of Viewers held in 1968.

STATEMENT OF INTERESTED PARTIES

Respondent CNG Transmission Corporation is a wholly owned subsidiary of Consolidated Natural Gas Company.

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15 U.S.C.A. § 717 *et seq.* 1

STATEMENT OF THE CASE

Respondent CNG Transmission Corporation ("Respondent") is in the business of, *inter alia*, transporting natural gas in interstate commerce. (App. at 12). Petitioner, Paul H. Stitt ("Petitioner"), is the owner of certain property located in South Beaver Township, Beaver County, Pennsylvania, through which runs an easement owned by Respondent. (App. at 13). In 1968, the Federal Power Commission issued a Certificate of Public Convenience and Necessity to Consolidated Gas Supply Corporation ("CGSC"), Respondent's predecessor-in-interest, to construct, operate and maintain a thirty-inch natural gas pipeline for the transportation of natural gas that was to run from Warren County, Ohio to Beaver County, Pennsylvania and then connect with other pipelines. (App. at 13). A portion of this pipeline was to run through the lands owned by Petitioner. (App. at 13).

Because CGSC could not reach agreement with Petitioner on the purchase of the easement necessary to construct the pipeline, and because it has the power of eminent domain under the Natural Gas Act, 15 U.S.C.A. § 717 *et seq.*, it passed a resolution of its Boards of Directors in 1968 to appropriate an easement across those lands. (App. at 13). The resolution stated that the easement was taken so as to construct, operate and maintain a thirty-inch pipeline over and across the lands of Petitioner. (App. at 13–14).

Following the filing of an action in eminent domain, the Beaver County Court of Common Pleas issued an order granting Respondent possession of the easement in September 1968, (App. at 14), and, subsequently, a Board of Viewers awarded Petitioner certain damages for the taking of the easement. (J.A. at 156a). Following an appeal of that award, Petitioner and Respondent entered into a settlement to conclude the condemnation action.

In the spring of 1995, approximately 548 feet of the 987 feet of pipeline on Petitioner's property were replaced with a slightly thicker-walled pipe to comply with certain federal regulations. (App. at 16–18). On April 6, 1995, Respondent filed with the District Court for the Western District of Pennsylvania a two-count Complaint. (App. at 14–15). The first count sought a preliminary and permanent injunction: (1) enjoining Petitioner from interfering with the replacement of the pipeline; (2) requiring Petitioner to allow Respondent's personnel and contractors to enter Petitioner's property so as to access the pipeline; and (3) ordering any other relief that is fair and just. (App. at 15).

On April 28, 1995, Magistrate Judge Caiazza signed a Stipulated Consent Decree wherein the parties agreed that Stitt was enjoined from interfering with Respondent's placement of the pipeline. (App. at 15). That injunction effectively gave Respondent the relief it requested in Count 1 of the Complaint. (App. at 15).

Count 2 of the Complaint requested a Declaratory Judgment establishing that the width of Respondent's easement across Petitioner's property is fifty feet. (App. at 15). On April 24, 1995, Petitioner filed an Answer denying the substantive allegations of Count 2 of the Complaint. (App. at 15). No counterclaim was filed with that Answer. (App. at 15).

On November 8, 1995, a bench trial was held before Magistrate Judge Caiazza. Both parties consented to the Magistrate Judge conducting the trial and all further proceedings in the case, including the entry of a final order.

In his Order dated November 30, 1995, Magistrate Judge Caiazza found that fifty feet is the reasonable and necessary width to construct, operate and maintain a thirty-inch gas

pipeline, and thus found that the right of way obtained by Respondent through the property of Petitioner extends to a width of fifty feet, measuring twenty-five feet on either side of the pipeline. (App. at 22).

Petitioner subsequently filed an appeal from that Order to the Court of Appeals for the Third Circuit. On August 14, 1996, the appeals court filed a Memorandum Opinion in which it affirmed the judgment of the district court. (App. at 1). Petitioner subsequently filed a petition for rehearing and rehearing en banc, which was denied by the court of appeals on September 16, 1996. (App. at 24). A Petition for a Writ of Certiorari then was filed in this Court.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari (the "Petition") should be denied because: (1) it raises questions not properly presented below; (2) the decisions of the courts below are not in conflict with the decisions of this Court or other applicable authority; (3) the Petition presents no new or complex issues and simply involves a routine dispute with minimal ramifications beyond its own factual context, and (4) the case was decided correctly by the courts below. This Petition involves nothing more than a litigant, displeased with the result below, raising phantom constitutional issues in the slim hope that this Court will grant certiorari.

I.

THE ISSUE OF "JUST COMPENSATION" IS NOT PROPERLY BEFORE THIS COURT.

This Court generally will not decide questions not raised or resolved below. *See, e.g., Youakim v. Miller*, 425 U.S. 231,

234 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940). Petitioner's First and Third Questions Presented For Review ask essentially the same question: Was just compensation paid to Petitioner when Respondent's predecessor-in-interest acquired an easement across his property? Petitioner's First Question raises this issue in a roundabout way, by asking if the decision of the courts below failed to properly apply precedent from this Court regarding takings for which just compensation must be paid. Petitioner's Third Question raises the issue directly by asking if the courts below concluded that just compensation had been given.

In either case, this question of just compensation is not properly before this Court because it was not presented to or ruled upon by the trial court. This case was tried as a declaratory judgment action initiated by Respondent seeking only a determination of the width of Respondent's easement over Petitioner's property, and Petitioner raised no counterclaim with respect to just compensation for the easement. In its holding, the trial court specifically stated that the issue of whether Petitioner received just compensation was "a separate and distinct issue which cannot be addressed in this action and/or on the basis of this record." (App. at 19). The Court of Appeals for the Third Circuit affirmed this aspect of the trial court's holding without comment.

Remarkably, Petitioner raises these Questions for Review despite the fact that he conceded in his Petition's Statement of the Case that the "sole issue before the Magistrate was the width of the easement owned by CNG which extends across the property of Stitt." (Petition at 3). Thus, by his own admission, Petitioner's First and Third Questions Presented For Review, which address whether he received just compensation, were not decided by the courts below and, therefore, should not be considered by this Court.

In trying to get through the back door what he cannot get through the front, Petitioner alleges that the court of appeals erred when that court observed that in 1968 the Board of Viewers could not have found that the easement was thirty inches wide because the Board awarded Petitioner $38,000 and not the $4,000 suggested by the appraiser for the condemnor. The court of appeals noted that the Board of Viewers knew that the condemnor was acquiring a right of entry for maintenance and that the Board made its award on that basis. Petitioner now apparently contends that the Board of Viewers did indeed believe the easement was only thirty inches wide, and that the Board awarded the higher $38,000.00 figure because of various effects on the property not considered by the condemnor's appraiser, e.g., coal and clay that could not be extracted and impairment of drainage.

Petitioner never raised these issues in the courts below. Rather, this information made its way into the record only as part of the Board of Viewers transcript, which was admitted primarily for the testimony of Mr. Amalia, a member of the Board of Viewers. Thus, it is too late in the day for Petitioner to be arguing that the court below disregarded critical facts that Petitioner failed to discuss in the trial court.

Furthermore, Petitioner merely speculates that the differential was based on these "overlooked facts." He offers no evidence to support his claim, which, therefore, ends up being no more than Petitioner's self-serving opinion regarding the basis for the award. Such factual arguments, which should have been presented in the trial court, cannot now offer a basis for arguing that the factual determinations of the district court, as well as the court of appeals' review of those determinations, were clearly erroneous. In any event, the courts below were not presented with or required to delve into the issue of just compensation or the reasons for the ultimate award of $38,000, and thus this Court need not do so.

II.

THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner attempts to support his Petition by claiming that the decisions of the courts below conflict with the decisions of this Court and the Court of Appeals for the Third Circuit. Specifically, Petitioner claims that the decisions in the instant case disregard "the importance [of a landholder's] right of exclusion" as articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). (Petition at 6). *Loretto* is inapposite.

Loretto dealt with whether a New York statute that required a landowner to permit cable television facilities to be installed on her property was a taking for which just compensation was due under the Constitution. Respondent agrees that a landowner's power to exclude is an important property right. However, this power is irrelevant to the instant case, in which the only issue before the district court was the width of Respondent's easement across Petitioner's land. Neither a landholder's power to exclude nor the question of whether Petitioner received just compensation for the taking of his land when Respondent acquired its easement are before this Court or were before the courts below.

Similarly, Petitioner claims that the decisions below conflict with *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994), which Petitioner argues stands in part for the proposition that "an implied right of maintenance does not carry with it the presumption that the parties intended a permanent encumbrance." (Petition at 10). Petitioner misconstrues the case. *Louis W. Epstein Family Partnership* dealt

in part with whether a leaseholder on a dominant estate had acquired an easement by implication in regard to a traffic sign it had erected on the servient estate. Petitioner apparently is confusing the appeals court's use of the word "maintain" in the sense of erecting and having a sign in a particular location, *see* 13 F.3d at 774, with the use of the word "maintain" in the instant case, in which the easement was intended to allow for Respondent's physical maintenance of the pipeline, such as the replacement of pipe that precipitated the case at bar.

Even if Petitioner's interpretation of "maintain" is correct, however, the decisions of the courts below did not rely in any way on an interpretation of an implied right of maintenance. Rather, the courts below interpreted the width of the easement in part by considering the language of the resolution effecting the taking, which explicitly granted a "right of way to construct, operate, and *maintain* a 30-inch pipeline over and across certain tracts of land . . . owned . . . by Paul H. Stitt" (emphasis added). (J.A. at 137a). The easement specifically included the right of maintenance of the pipeline; the only question before the district court was the width of the easement.

III.

THE PETITION PRESENTS NO NEW OR COMPLEX ISSUES OF LAW.

The issues presented to the court of appeals in this case were: (1) whether the district court correctly found under the testimony presented to it that Respondent has a fifty-foot easement across the lands of Petitioner; and (2) whether the district court erred in its consideration of the testimony of Mr. Amalia and its treatment of the Board of Viewers transcript. Neither of these issues involves new or complex issues of law. Rather, the district court determined the width of Respondent's

easement based only on this case's unique facts and the application of well-established Pennsylvania law regarding easements. As for the Board of Viewers transcript, the appeals court held that the district court did consider it; however, the court did not give it the weight and interpretation that Petitioner would have preferred. The result in this case has virtually no effect on anyone other than the Petitioner and Respondent, and Petitioner essentially is seeking reconsideration of the factual dispute by the United States Supreme Court. Thus, this case is not worthy of consideration in this Court.

IV.

ON THE SOLE ISSUE BEFORE IT, THE DISTRICT COURT CORRECTLY FOUND THAT RESPONDENT HAS A FIFTY-FOOT EASEMENT ACROSS THE LANDS OF PETITIONER.

It has long been the rule in Pennsylvania that when the width of an easement is not specified in a grant, and when the grant is for a particular object, the width must be suitable and convenient with reference to that object. *Lease v. Doll*, 485 Pa. 615, 620 n.5, 403 A.2d 558, 561 n.5 (1979). Further, when the grant of an easement is unrestricted, the grantee is given such rights as are necessary for the reasonable and proper enjoyment of the thing granted. *Taylor v. Heffner*, 359 Pa. 157, 162–63, 58 A.2d 450, 453 (1948). The easement in this case was appropriated for the construction, operation and maintenance of a gas pipeline, and thus the easement must be of such a width to permit Respondent to reasonably operate and maintain the pipeline.

This matter has been decided by both federal and state courts, and with remarkable consistency they have held not only that the easement is self-evidently larger than the pipeline itself, but they have almost uniformly settled on fifty feet as an

appropriate width. *See, e.g., Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538 (3d Cir. 1995); *Columbia Gas Transmission Corp. v. Savage*, 863 F. Supp. 198 (M.D. Pa. 1994); *Columbia Gas Transmission Corp. v. Burke*, 768 F. Supp. 1167 (N.D. W. Va. 1990); *Columbia Gas Transmission Corp. v. Large*, 619 N.E. 2d 1215 (1992).

The above cases deal with easements acquired by deed as opposed to eminent domain, but there is no difference in the legal principles applicable to the width of the easement. The courts in those cases were concerned with an *interest in land* that is undefined as to width. The reasoning is not based on *how* the interest was acquired. Acquiring a property by a resolution through an eminent domain proceeding leads to the same result as acquiring that easement through a deed — the transferee has an interest in property. Since that interest in property was in this case undefined as to width, the width is that necessary to enjoy the easement.

In the present case, the instrument creating the easement — the resolution of the Board of Directors of CGSC — provides that the purpose of the easement is to construct, operate and maintain a thirty-inch natural gas pipeline. As in *Tarbuck*, there was clear unrebutted record evidence presented by Respondent that a fifty-foot width is necessary to effect the purpose of the easement. Such evidence included the need for a twenty-five foot clearance on one side of the pipeline to accommodate the heavy equipment used to maintain the pipeline, and the need for a twenty-five foot clearance on the other side to both store dirt excavated from around the pipeline and to accommodate additional equipment. (App. at 17). Furthermore, the vehicles and equipment necessary to work on a thirty-inch pipeline can weigh up to forty-seven tons and have a tread width of fourteen feet. (App. at 18). Thus, it makes no sense, either legally or factually, to assert that the only easement Respondent has is a thirty-inch easement co-extensive with the width of the pipeline.

Equally as significant, Petitioner submitted *no* evidence in the trial court on the issue of whether fifty feet was the width necessary to maintain the pipeline. Although he had the opportunity to do so, Petitioner did not, for example, present expert testimony that thirty or forty feet would be more appropriate than fifty feet. Thus, Petitioner is in no position to argue to this Court that the determinations of the courts below were clearly erroneous.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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